United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

S.A.M. DATE: November 21, 2016

To: Cornele A. Overstreet, Regional Director
Region 28

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Oliveria Clips, Inc. d.b.a. Great Clips
Cases 28-CA-177975, 28-CA-177978,
28-CA-177979

512-5012-0133-1100
512-5012-0133-1600
512-5012-0133-4400
512-5012-3322

The Region submitted these cases for advice as to whether they are an appropriate vehicle to (1) urge the Board to expand its holding in *Purple Communications, Inc.*[1] to include employee use of fax machines for Section 7 purposes and (2) urge the Board to overturn the discrimination standard articulated in *Register Guard*.[2] We conclude that these cases are an appropriate vehicle to expand the rationale of *Purple Communications* and find that the Employer's prohibition against employees using the Employer's fax machines for nonbusiness purposes on nonworking time is unlawful. We also conclude that the Region should urge the Board to overturn the *Register Guard* discrimination standard and hold that an employer cannot prohibit the use of its equipment for Section 7 purposes if it allows employees to use its equipment for any personal purposes.[3]

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[1] 361 NLRB No. 126, slip op. at 1, 14 (Dec. 11, 2014).

[2] 351 NLRB 1110, 1117-18 (2007), *enforced in relevant part sub nom. Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), *reaffirmed as modified*, 357 NLRB 187, 188 & n. 7 (2011).

[3] (b) (5)
(b) (5)
[redacted]

FACTS

The Employer's Fax Machines and Business Use Policies

Oliveria Clips, Inc. d.b.a. Great Clips (the Employer) owns and operates 26 hair salons in several cities across the Phoenix metropolitan area. Some of the Employer's salons are separated by more than 70 miles.

Each of the Employer's salons has a fax machine in the salon's break room or in an office adjacent to the break room. The Employer regularly uses the fax machine to circulate information to each salon, such as reports on employee productivity. Employees communicate with the Employer by using the fax machine to, for example, submit requests for vacation days or FMLA paperwork. Employees and supervisors also use the fax machines for personal business, including transmitting documentation related to mortgages, child support, and immigration.

The Employer maintains a policy that states that all salon equipment, including fax machines, are company property and employees are "strictly prohibited from using Company property for any reason other than conducting Company business." The policy further states that "any employee who uses Company property for any reason other than the conducting of Company business is subject to immediate termination."

The Employer Begins Strictly Enforcing Productivity Goals

In April 2016,[4] the Employer announced to its employees that it would begin strictly enforcing a company productivity policy. The policy provides that the Employer may deduct a percentage of hair stylists' wages if they are not meeting company goals for seeing clients within a certain allotted time or selling a certain amount of hair care products. Supervisors and managers also met with stylists one-on-one to discuss their productivity and how their pay would be affected as a result of the newly enforced policy.

After the announcement and one-on-one meetings, stylists at the East Guadalupe Road salon began discussing the newly enforced policy. In early June, Stylist A drafted a letter to the Employer objecting to the wage reduction policy. The letter was addressed directly to the Employer and stated, *inter alia*, that "none of us like or think it is fair…to lose percentages of our hourly wages in such a sudden manner when we have earned the raises over the years…" The letter also argued that the

[4] All dates *infra* are 2016 unless otherwise noted.

Employer's expectations of stylists' productivity – in particular the 16 and a half-minute time slot allotted for interacting with each customer – were "nearly impossible to meet" and that the requirement to sell a certain amount of products was "more than absurd." The letter concluded by stating that, "we are only asking for current earned pay to be left alone [or] we will stage a walk out at every salon you own, call the media, and make the public very aware of the mistreatment that we are being faced with," and left blank lines below the text for signatures.

Stylist A shared the protest letter with [redacted] coworkers at the East Guadalupe Road salon. [redacted] coworkers told [redacted] that they discussed the letter with stylists at other locations and that those employees were interested in seeing the letter as well. Since it would be impractical to drive to 25 other salons to share the letter and solicit signatures, Stylist A faxed the letter from a local copy shop to all of the Employer's salons. Stylist A and two coworkers also signed a copy of the letter, and Stylist A then faxed the copy with those three signatures to the East Guadalupe Road salon.

The Employer Terminates Stylist A and Stylist B after They Send and Receive the Protest Letter Using the Company's Fax Machines

On [redacted], Stylist A's next scheduled work day, Stylist A arrived at work and [redacted] supervisor told [redacted] that [redacted] needed to speak with [redacted]. Stylist A accompanied [redacted] to the supervisor's office, where a manager was also present. The supervisor told Stylist A, "you faxed this letter from our fax machine and we have proof." The supervisor asked [redacted] to sign an involuntary employment separation form, stating that [redacted] had faxed a "personal message" to multiple locations asking employees to sign a letter that threatened a walkout to protest employee wage reductions. The separation form also stated that the letter was sent to "fax machines which are company property." Stylist A refused to sign the form. The Employer also discharged Stylist B, an employee at a different location, shortly after [redacted] attempted to retrieve the protest letter from [redacted] salon's fax machine in the presence of the salon manager. The Region has concluded that the Employer discharged both stylists in response to their protected concerted activity, in violation of Section 8(a)(1).

The Employer's Position on Special Circumstances

The Employer denies that its employees use fax machines in the course of their work and thus asserts that no showing of special circumstances is necessary to justify restricting employees from using its fax machines for personal use on nonwork time. The Employer stated, however, that the "business use only" policy was implemented because, in the past, an employee used a company computer to search the Internet for pornography and there was no company policy in effect to justify that employee's termination. The Employer is also concerned that faxes sent to all salons using the Employer's fax machines and paper could be misinterpreted as a company-sponsored

notice. The Employer also explained that employees may use the company's fax machines for personal reasons if they obtain permission from the Employer.

ACTION

We conclude that these cases are an appropriate vehicle to expand the rationale of *Purple Communications* and urge the Board to find that the Employer's prohibition against employees using the Employer's fax machines for nonbusiness purposes on nonworking time is unlawful. We also conclude that these cases are an appropriate vehicle to urge the Board to overturn the *Register Guard* discrimination standard, return to the prior standard, and hold that an employer cannot prohibit the use of its equipment for Section 7 purposes if it allows employees to use its equipment for any personal purposes. Under that standard, the Employer unlawfully discharged Stylists A and B based on their use of the Employer's fax machines for Section 7 activity.[5]

A. Similarities Between Fax Communication and Email and Advancements in Technology Weigh in Favor of Extending *Purple Communications* to Employer Fax Machines

In *Purple Communications*, the Board overruled *Register Guard*'s holding that employees have no statutory right to use their employer's email system for Section 7 purposes and adopted the presumption that "employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time."[6] To justify a total ban on employees' nonwork use of email, including Section 7 use on nonworking time, an employer must demonstrate that "special circumstances make the ban necessary to maintain production or discipline."[7] Where a total ban is not justified, an employer "may nonetheless apply uniform and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain production and discipline."[8] Although the Board's decision in *Purple*

[5] (b) (5) [redacted]

[6] 361 NLRB No. 126, slip op. at 14.

[7] *Id.*, slip op. at 1.

[8] *Id.*; *see T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 2 n. 6, 21-22 (Apr. 29, 2016) (Board adopted ALJ decision finding that employer failed to establish that ban

Communications specifically focused on an employer's email system, the Board noted that "[o]ther interactive electronic communications…may ultimately be subject to a similar analysis."[9]

Communication by fax shares many of the same features as email that were discussed by the Board in *Purple Communications*, and these attributes weigh in favor of extending employees' presumptive rights to include using fax machines for Section 7 activities on nonworking time. Like email, sending and receiving faxes is a critical means of Section 7 communications among employees who work for the same employer but at different locations or on different days or shifts, and do not have access to email or the internet at work. Like email, communication over fax permits employees to wait to retrieve or send faxes when they are on nonworking time, and employees can easily ignore faxes that they are not interested in receiving.[10] Additionally, not all employees have access to a fax machine outside of the workplace.[11] Thus, the similarities between email and fax communication weigh in favor of extending the presumptive right of employees to use such means of communication for Section 7 activities on nonworking time.[12]

Furthermore, telephone and fax machine technology has undergone substantial changes in the decades since the Board last considered employees' use of employer telephones. In two 1980's cases that were decided on discriminatory enforcement grounds, *Churchill's Supermarkets* and *Union Carbide Corporation*, administrative law judges suggested in dicta that an employer could bar employees from using telephones for personal use.[13] However, as the Board discussed in *Purple*

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on nonbusiness use of employer communication systems was necessary to maintain production and discipline).

[9] 361 NLRB No. 126, slip op. at 14 n.70.

[10] *Cf. Purple Communications*, 361 NLRB No. 126, slip op. at 15 & n. 72 (noting the similar attributes of email).

[11] *Cf. id.*, slip op. at 6 n. 18 (recognizing that due to costs and other circumstances, "some employees do not privately use any electronic media").

[12] *Cf. Windsor Care Center of Sacramento*, Case 20-CA-168369, Advice Memorandum dated July 20, 2016 at 5-7 (arguing in favor of extending *Purple Communications* to the company-provided internet system).

[13] *Churchill's Supermarkets*, 285 NLRB 138, 139, 155 (1987), *enforced mem.* 857 F.2d 1474 (6th Cir. 1988); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981), *enforced in relevant part*, 714 F.2d 657, 663-64 (6th Cir. 1983).

Communications, "telephone systems of 35 years ago…are, at best, distant cousins of the sophisticated digital telephone systems that are now prevalent in the workplace."[14] Indeed, concerns about "tying up the line" would have been widely understood as valid when telephone systems had limited capacity and function, as opposed to now with the advent of multiple lines, call waiting, voice mail, and other modern characteristics.[15] Similarly, today, fax machines operating over the internet, or even those that use a traditional analog phone line, queue incoming transmissions as necessary, and users can program the next outgoing fax even as the machine is sending or receiving another one. Thus, as technology has advanced, the management interests at issue in regulating employee use of telephones and fax machines have changed. And to the extent that *Churchill's Supermarket* and *Union Carbide* can be read to uphold an employer's ban on personal use of an employer's telephone system or fax machines that operate over a telephone system, they should be overruled.

These facts in particular make a compelling case for applying Section 7 protections to employer fax machines. Here, stylists work for the same company at 26 different locations and may be situated as much as 70 miles apart from one another, yet they have no access to employer email as a means of communicating with each other. As was the case here, it would be impracticable if not impossible for employees to visit every salon location to engage with their coworkers for Section 7 purposes. The stylists are also unlikely to have personal contact information for all other stylists. In this case, Stylist A knew that [redacted] concern over the Employer's pay structure was of grave concern to [redacted] immediate coworkers. By faxing the protest letter to coworkers at other salons, including Stylist B, Stylist A was attempting to solicit further support and potentially engage with the Employer on behalf of a larger constituency. Fax machines for these employees in particular are a valuable tool that permits them to communicate with each other just as in different work environments, email communication might be the natural way for other types of employees to engage in Section 7 activity.

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[14] *Purple Communications*, 361 NLRB No. 126, slip op. at 9. Although the Board noted the similarities between email and phones and questioned the broad dicta in *Churchill's Supermarkets* and *Union Carbide*, the Board ultimately concluded that the case before it did not squarely present the issue of employees' personal use of employer telephones and declined to address it. *See id.*, slip op. at 9 & n. 38.

[15] *See id.*, slip op. at 9 n. 38; Brief of the General Counsel to the Board in *Purple Communications*, Cases 21-CA-095151, et al., dated June 16, 2014 at pp. 9-10 n. 4.

B. The Employer's "Business Use Only" Policy Is Unlawful under an Expansion of *Purple Communications*

The Employer asserts that its employees do not have access to the Employer's fax machines in the course of their work. The Region's investigation revealed, however, that employees use the fax machines located in salon break rooms or adjacent offices to communicate with the Employer by, for example, submitting requests for vacation time or FMLA documentation. And there is no dispute that the Employer maintains a policy that all company equipment, including fax machines, can be used only for company business and employees are subject to termination for violating this policy. Since the evidence demonstrates that employees have access to the Employer's fax machines in the course of their work, the Employer's "business use only" policy would violate the Act if *Purple Communications*' holding is extended to include fax machines, unless the Employer can establish special circumstances.

As the Board held in *Purple Communications*, in order to establish a "special circumstances" defense to its prohibition against Section 7 protected use of its electronic communications systems, an employer "must demonstrate the connection between the interest it asserts and the restriction" it imposed.[16] It is "the rare case where special circumstances justify a total ban" on personal use.[17] Where a total ban is not justified, the Employer may apply uniform and consistently enforced controls that are necessary to maintain production and discipline.[18] However, with respect to such controls, special circumstances will be established "only to the extent that those interests are not similarly affected by employee…use that the employer has authorized."[19]

Here, the Employer claims that it created its "business use only" policy to prevent employees from viewing pornography on company equipment and that it is concerned that faxes sent to all salons using the Employer's fax machines and paper could be misinterpreted as a company-sponsored notice. Neither of the Employer's claims justifies a complete ban on personal use of its fax machines. As to the Employer's interest in preventing employees from accessing pornography, the Employer could

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[16] *Purple Communications*, 361 NLRB No. 126, slip op. at 14 ("The mere assertion of an interest that could theoretically support a restriction will not suffice").

[17] *Id.*

[18] *Id.*

[19] *Id.* (footnote omitted).

design a narrower restriction to prevent such inappropriate use of its equipment without restricting use for Section 7 activities on nonwork time, and, in any event, this concern has little relevance to fax communication. As to the second concern, a reasonable employee would not presume that every fax sent over the Employer's equipment or received at a salon fax originates with the Employer. In this case, for example, the protest letter was addressed to the Employer and immediately referred to "our pay reduction," clearly indicating that the fax originated with employees. Therefore, to the extent that the Employer has offered either concern as justification for its prohibition, it has failed to demonstrate a connection between its interests and its total ban on personal use of salon fax machines.[20]

Further, to the extent that the Employer claims to permit personal use of the salon fax machines provided that employees obtain prior approval, a work rule that requires employees to secure permission from their employer prior to engaging in Section 7 activities on nonwork time generally is unlawful because it chills employees from engaging in protected activities.[21] Although it is not clear that the Employer can even show a uniform and consistently applied prior-approval requirement, in any event, the Employer has not demonstrated how such a requirement is necessary to maintain production and discipline. In fact, it is difficult to understand how use of the fax machine for Section 7 purposes would affect production and discipline any more than the personal use that the Employer previously has authorized. As it stands, absent a legitimate business reason for requiring prior approval of all personal use of the salon fax machines on nonwork time, the Employer's policy infringes on the exercise of employees' Section 7 rights.[22]

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[20] Although the Employer has not raised the issue of the costs associated with employee use of its fax machines, we note that the Board in *Purple* rejected the argument that an employer's interest in its personal property would permit an employer to lawfully ban all employee use of its equipment for Section 7 purposes. *See id.*, slip. op. at 10. The Board overruled *Johnson Technology*, 345 NLRB 762 (2005) (holding that an employer's property rights in a sheet of recycled copier paper permitted the employer to prohibit employee use of that paper for publicizing a union meeting), noting that "such an absolutionist approach to property rights cannot be reconciled with the Act." *Id.*, slip op. at 10 n.47.

[21] *See Brunswick Corp.*, 282 NLRB 794, 794-95 (1987) (finding unlawful an employer rule that required employees to obtain permission before engaging in union solicitation in work areas during non-work time, and in the lunchroom and lounge areas during non-work time); *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001) (finding unlawful rule requiring prior authorization to distribute literature).

[22] *Cf. Lafayette Park Hotel*, 326 NLRB 824, 827 (1998) (finding lawful an employer rule requiring employees to obtain permission to use the restaurant or cocktail lounge

C. The Board Should Return to the Pre-*Register Guard* Discrimination Standard

The Region should also use these cases as a vehicle to urge the Board to return to the discrimination standard prevailing prior to *Register Guard* and find that the Employer unlawfully terminated Stylists A and B under the prior standard.

In *Purple Communications*, the Board overruled *Register Guard*'s holding regarding employees' rights to use employer email systems, but did not address *Register Guard*'s definition of discrimination under Section 8(a)(1).[23] In *Register Guard*, the Board redefined discrimination under Section 8(a)(1) as the "unequal treatment of equals."[24] Under this standard, an employer violates Section 8(a)(1) if a policy, on its face, draws lines based on Section 7 activity but does not violate Section 8(a)(1) by distinguishing between business and nonbusiness use, charitable and noncharitable solicitations, personal and commercial solicitations, individual and organizational solicitations, and solicitations and mere talk.[25]

Prior to *Register Guard*, the Board consistently held that when an employer permits employees to engage in nonwork-related solicitations or other use of employer property, it must similarly allow Section 7-related uses. For example, in *Blue Circle Cement Co.*, the Board found that the employer violated Section 8(a)(1) by discharging an employee who used the company's photocopier to copy materials related to his protected, concerted activity while the employer permitted employees to use photocopiers for other nonwork-related purposes, such as copying materials related to church events and little league baseball schedules.[26] The standard adopted in

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to entertain friends and guests because reasonable employees would not interpret the rule as requiring approval for Section 7 activity and there were legitimate business reasons for requiring the permission), *enforced mem.* 203 F.3d 52 (D.C. Cir. 1999).

[23] *See Purple Communications*, 361 NLRB No. 126, slip op. at 5 n.13.

[24] 351 NLRB at 1117.

[25] *Id.* at 1118. The Board also noted that an employer would violate the Act if it permitted employees to use email to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by prounion employees. *Id.*

[26] 311 NLRB 623, 624-25, 628 (1993), *enforced,* 41 F.3d 203 (5th Cir. 1994); *see also Benteler Industries,* 323 NLRB 712, 714 (1997) (finding employer violated Section 8(a)(1) by refusing employees' requests to post union-sponsored literature on bulletin boards while permitting other employees to post personal, nonwork-related notices),

Register Guard fails to recognize that the essence of a Section 8(a)(1) violation is interference with Section 7 rights, not discrimination.[27] The *Register Guard* standard ignores the fact that Section 7 guarantees employees the affirmative right to engage in concerted activity for mutual aid or protection, not just the right to be free from discrimination, and that the affirmative right should only be restricted to the extent necessary to accommodate an employer's interest in production and discipline.[28] An employer's discriminatory treatment of Section 7-related communications is relevant to a Section 8(a)(1) violation only because allowance of other nonwork communications undermines the employer's business justification for interfering with Section 7 rights.[29]

The Region concluded that the Employer violated Section 8(a)(1) under *Register Guard*'s discrimination standard because it has tolerated some personal use of its fax machines in the past, but applied the policy to terminate Stylists A and B for using its fax machines for Section 7 activity. Nonetheless, the Employer could argue that it permits employees to use salon fax machines for personal financial or legal matters, but it prohibits any solicitation over its equipment. In that case, the policy would not entail discrimination strictly along Section 7 lines. Thus, under *Register Guard*, the Employer's reframed policy would not violate Section 8(a)(1) even though it would in effect prohibit most Section 7 activity while tolerating other personal use of its equipment. Therefore, the Region should use these cases as a vehicle to argue that, in order to protect Section 7 rights, the Employer should not be able to make such a distinction and should only be permitted to restrict Section 7 activity to the extent necessary to accommodate its interest in production and discipline.

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enforced mem. 149 F.3d 1184 (6th Cir. (1998); *Saint Vincent's Hospital*, 265 NLRB 38, 40 (1982) (prohibiting distribution of union literature while permitting personal solicitations), *enforced in relevant part*, 729 F.2d 730 (11th Cir. 1984). Prior to *Register Guard*, in cases involving access by nonemployees, the Board recognized two exceptions where disparate treatment did not constitute unlawful discrimination under Section 8(a)(1): where an employer permitted only a small number of isolated "beneficent acts"; and where solicitation approved by the employer related to its business functions and purposes, such as a blood drive in a hospital setting. *See Lucile Salter Packard Children's Hospital at Stanford v. NLRB*, 97 F.3d 583, 587-88 (D.C. Cir. 1996), *enforcing* 318 NLRB 433 (1995).

[27] *Register Guard*, 351 NLRB at 1129 (Liebman and Walsh dissenting).

[28] *Id.* at 1123-24, 1129 (Liebman and Walsh dissenting) (relying upon *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)).

[29] *Id.* at 1129 (Liebman and Walsh dissenting).

Accordingly, the Region should issue complaint, absent settlement, consistent with the foregoing.

/s/
B.J.K.

ADV.28-CA-177975.Response.GreatClips (b) (6), (b)